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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK DION TILLMAN,

Defendant and Appellant.

C080576

(Super. Ct. No. 09F09412)

Defendant Derrick Dion Tillman appeals from the trial court's order denying his petition to recall his sentence. (Pen. Code, § 1170.126 [unless otherwise set forth, statutory references that follow are to the Penal Code].) Defendant contends: (1) He is entitled to second-strike resentencing, and prospective-only application of Proposition 36 denies equal protection; (2) Under the Sixth and Fourteenth Amendments, the trial court was precluded from finding that defendant was armed with a firearm in the commission of an offense. We affirm the trial court's order.

## FACTS AND PROCEEDINGS

On March 15, 2012, a jury convicted defendant of evading a peace officer with willful and wanton disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a); count 1); carrying a concealed weapon (§ 25400; count 2); carrying a loaded firearm (§ 25850; count 3); and being a felon in possession of a firearm (§ 29800; count 4). (*People v. Tillman* (May 16, 2013, mod. May 24, 2013) C070879 [nonpub. opn.] slip opn. at p. 1 (*Tillman I*.) (We granted the parties' request for judicial notice of the opinions in defendant's prior cases, construing it as a request to incorporate the records of those cases by reference.) The trial court thereafter found that defendant had incurred two prior strikes, for robbery and attempted robbery. (*Tillman I, supra*, slip opn. at p. 1.)

We summarized the facts of defendant's offenses in *Tillman I* as follows:

"Defendant, a parolee at large, led peace officers on a short pursuit after they sought to apprehend him on December 29, 2009.

"When well-marked officers descended upon defendant as he was backing his car out of a residential driveway, he ignored their surrender commands and instead drove off, nearly striking a patrol car.

"A half-mile vehicle pursuit ensued that encompassed speeds up to 50 miles per hour, the running of a stop sign and a traffic light, the taking of evasive action by other drivers, and the discard from defendant's vehicle of a loaded .38-caliber revolver and about an ounce of marijuana.

"Defendant eventually pulled into a parking lot, stopped his car, and got out with his hands up. Along for the ride was defendant's adult son.

"A search of defendant's car disclosed a black ski mask, black gloves, two additional black beanies, several plastic baggies, and a pair of binoculars." (*Tillman I, supra*, slip opn. at pp. 2-3.)

On April 13, 2012, the trial court denied defendant's request to strike strikes and sentenced him to an aggregate state prison term of 50 years to life. The court imposed 25 years to life consecutively under the three strikes law on counts 1 and 4, while staying sentence on counts 2 and 3 pursuant to section 654. (*Tillman I, supra*, slip opn. at pp. 1-2.)

Defendant appealed, contending inter alia that trial counsel was ineffective for failing to argue, pursuant to *People v. Garcia* (1999) 20 Cal.4th 490, 492-493 (*Garcia*), that the court could strike prior strikes as to one count only. (*People v. Tillman* (Feb. 25, 2015, C075552) [nonpub. opn.] slip opn. at p. 2 (*Tillman II*).)

On November 6, 2012, after the filing of defendant's appeal in *Tillman I*, the voters passed Proposition 36, enacting the Three Strikes Reform Act of 2012 (the Act), which became operative the following day. (*Tillman II, supra*, slip opn. at p. 2.)

In *Tillman I*, this court agreed with defendant that trial counsel was ineffective and vacated his sentence, directing the trial court on resentencing to "exercise its discretion as authorized by *Garcia, supra*, 20 Cal.4th 490." (*Tillman I, supra*, slip opn. at p. 10.) Our unpublished opinion was filed on May 16, 2013, and the remittitur issued on July 17, 2013. (*Ibid.*)

On remand, instead of following this court's directions on remittitur, the trial court resentenced defendant pursuant to section 1170.126 to a two-strike term of seven years four months. (*Tillman II, supra*, slip opn. at pp. 2-5.) The People appealed. (*Tillman II, supra*, slip opn. at p. 3.) This court vacated the sentence and remanded the matter again, ordering the trial court to comply with our original remittitur and determine whether *Garcia* discretion should be exercised. (*Tillman II, supra*, slip opn. at p. 5.) If the trial court chose to exercise discretion by striking one strike under *Garcia*, it was directed to resentence defendant to a term of 25 years to life; if the court chose not to strike a strike, it was to resentence defendant to a term of 50 years to life. (*Tillman II, supra*, slip opn. at p. 4.)

On June 26, 2015, the trial court exercised its discretion to strike the prior strike on count 4, imposing a sentence of 25 years to life on count 1 and an eight-month sentence on count 4. On August 3, 2015, defendant filed supplemental points and authorities seeking resentencing pursuant to section 1170.126.

On October 23, 2015, the trial court denied defendant's petition, finding that he was ineligible for section 1170.126 resentencing because he was armed with a firearm during the commission of the third strike offense (count 1; evading an officer). The court stated that it had read the trial transcript to refresh its memory, and the evidence at trial proved defendant was armed with a firearm as the term is defined by law.

## DISCUSSION

### I

#### *Retroactivity*

Defendant contends he is entitled to automatic resentencing under section 1170.126 because the Act applies retroactively. In a decision published after defendant filed his opening brief, our Supreme Court rejected defendant's argument. (*People v. Conley* (2016) 63 Cal.4th 646, 655-662.)

### II

#### *Increased Sentence*

Defendant contends the trial court could not properly find that he was armed with a firearm in the commission of his third-strike offense, because any finding which increases a defendant's sentence for the underlying offense, must be made by a jury under the Sixth and Fourteenth Amendments to the United States Constitution. As defendant acknowledges, this court and other appellate courts have rejected his argument. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 662-663; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1315-1316; *People v. Osuna* (2014) 224 Cal.App.4th 1020, 1038.)

Defendant cites no authority on point holding otherwise. We decline to reconsider this question.

DISPOSITION

The order denying defendant's petition for resentencing is affirmed.

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.